FILE COPY

72-237

NO.

Supreme Court, U. S.
FILED
AUG 11 1972
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1972

72-237

WILLIAM C. RUSCH,

Petitioner,

vs.

~~PEOPLE OF THE STATE OF~~ ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND JUDICIAL DISTRICT

CHARLES A. BELLOWS
10 South LaSalle Street
Chicago, Illinois 60603
Attorney for Petitioner

JASON E. BELLOWS
On the Brief

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

INDEX

PAGE

Opinion Below 1

Jurisdiction 2

Questions Presented 2

Statement 2

Reason for Granting the Writ 7

Conclusion 9

Appendices:

Appendix A—Opinion of Appellate Court .....App. 1

Appendix B—Judgment Order entered December 27, 1971 .....App. 4

Appendix C—Order Denying Rehearing .....App. 5

Appendix D—Order Denying Petition for Leave to Appeal .....App. 6

AUTHORITIES

Cases

Gordon v. United States (6 Cir., 1949) 178 F.2d 896 7

People v. Cooper, 398 Ill. 468, 75 N.E.2d 885 7

People v. Rivers, 410 Ill. 410, 102 N.E.2d 303 8

People v. Thunberg, 412 Ill. 565, 107 N.E. 2nd 843 8

People v. Wallenberg, 24 Ill.2d 350, 181 N.E.2nd 143 .. 9

Pointer v. Texas, 380 U.S. 400 7

In the Supreme Court of the United States

OCTOBER TERM, 1972

NO.

WILLIAM C. RUSCH,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND JUDICIAL DISTRICT

Petitioner prays that a writ of certiorari issue to review the judgment of the Appellate Court of Illinois, Second Judicial District, entered in this cause on December 27, 1971.

Opinion Below

The opinion of the Appellate Court of Illinois is reported at 3 Ill. App. 3d 500, 278 N.E. 2d 198, and the opinion is reprinted herein as Appendix A, infra.

Jurisdiction

The judgment of the Appellate Court (Appendix B, infra) was entered on December 27, 1971. A timely petition for rehearing was filed. The petition for rehearing was denied on February 23, 1972. A petition to the Supreme Court of Illinois for leave to appeal was timely filed. It was denied on May 23, 1972. The jurisdiction of this Court is invoked under Title 28, U.S.C. 1257(3).

Question Presented

Whether "independent research" by the trial judge into matters testified to by the petitioner's treating psychiatrist denied the petitioner the right of confrontation of witnesses and due process of law contrary to the Sixth and Fourteenth Amendments to the Constitution of the United States.

Statement

The petitioner, who will be hereinafter sometimes referred to as the defendant, was convicted in the Circuit Court for the Nineteenth Judicial Circuit, McHenry County, Illinois of driving on a suspended or revoked license and failing to reduce speed to avoid an accident. On August 14, 1969, he was released on probation. On April 24, 1970, he was charged with driving a motor vehicle with a suspended or revoked license. Contrary to the statement in the opinion of the Appellate Court, the defendant was prosecuted for this latter offense and entered a plea of guilty. This offense was also the basis for the petition for revocation of the earlier probation. The trial court heard the case in two parts; the first part was on a determination of whether probation should be revoked and the second part was on the question of determination of sentence.

The defendant, himself, testified and gave a brief history of himself. He stated that he was 44 years old, lived

in Barrington Hills, Illinois, and was one of the founders and executive officers of the Aluminum Coil Annodizing Corporation. The defendant stated that at the time of his last arrest, he was coming from lunch with three people who work for him at the plant and was going home to bed. The defendant had been at the plant for 8 hours during the night because of a breakdown in equipment. When the equipment in the plant broke down, he drove his car from his home to the plant. The breakdown occurred in the early morning hours and he was unable to have anyone else drive him. The defendant stated that he realized that his conduct was wrong and also stated that he was under the care of a psychiatrist, Dr. Marvin Ziporyn of Chicago.

Dr. Ziporyn also testified. He stated that he had been seeing Mr. Rusch at his offices in Chicago. Dr. Ziporyn made a mental identification examination of Mr. Rusch which consisted of questions and answers designed to indicate the patient's orientation, his state of knowledge, ability to calculate, ability to abstract reason, his emotional response under stress and general mental function in terms of cogital effect in terms of volition.

Dr. Ziporyn stated that the results of the examination showed that Mr. Rusch had a deep seated emotional problem of a specific psychiatric disorder, namely, a passive-aggressive personality disorder. Dr. Ziporyn defined a passive-aggressive personality disorder as one in which there is involved the acting out of emotional stress which causes over-action and causes the individual to come into conflict with his environment even in terms of his family or general social structure. Dr. Ziporyn stated that in Mr. Rusch's instance, the illness consisted of various patterns of action. The individual who is generally quiet until he undergoes stress. Then he explodes, much of a

manner of a child who is frustrated. There are temper tantrums, overt actions, verbal outbursts, aggression and symbolic aggression, such as using a motor vehicle as an outcry for aggression in terms of driving faster than limits, and things of that nature. The individual, according to Dr. Ziporyn, essentially acts out the velocity of his tension and frustration in terms of overt action. Driving an automobile is not the only overt action which manifests this illness. There was also a repeated pattern of numerous quarrels with various family figures, outcries, outbursts, and the inability to tolerate frustrations without trampling the feelings of others and occasionally the use of physical violence. Physical violence was used specifically on the defendant's brother.

Dr. Ziporyn stated that he had seen Mr. Rusch on a regular basis since making his diagnosis and he had completed the first phase of the treatment. This phase took approximately five months to complete.

Under further examination, Dr. Ziporyn testified that the driving of an automobile was in the nature of an outlet for the feeling of frustration which he had discussed, that it was a symbolic release. Instead of engaging in a fight with a close family figure, it was more acceptable to drive an automobile and use this as a means of releasing tensions.

Dr. Ziporyn further testified that he had seen Mr. Rusch on a regular basis since making his diagnosis. He stated that the first phase of the treatment took approximately five months. The first phase of treatment consisted of instilling the insight into the patient in order to help him realize that he has a problem and to give him better judgment in terms of determining future action. The second phase of treatment is to decondition the patient's old pattern of actions in his prior lifetime, and the third phase

is reconditioning the patient to a new pattern of handling stress.

Dr. Ziporyn stated that since the beginning of treatment, he had seen marked changes in Mr. Rusch's personality. He stated that the most apt description was that of maturation. He stated that the essence of the disorder is that the emotional development of the individual has not kept up with the chronological development. The person afflicted with this disorder acts in the infantile manner of, "I want what I want, when I want it, or I am going to have a temper tantrum." In terms of maturation, there is a learning on the part of the individual to defer instant gratification, to learn to tolerate our need for over-all blaming, and to realize that life is a matter of inter-action and compromise within our environment. On this part of maturation, Dr. Ziporyn stated that he thought Mr. Rusch had accomplished.

Dr. Ziporyn also testified that if Mr. Rusch would continue on his present pattern of treatment, he should achieve maturity and full recovery from this particular problem in 12 to 18 months.

Dr. Ziporyn testified that he was familiar with the psychiatric facilities available at the State Prison Farm in Vandalia and that to his knowledge there were none there.

The above is essentially all of the evidence which was introduced both at the hearing on revocation of probation and later, before another judge on the hearing on aggravation and mitigation. None of the above evidence was discussed by the Appellate Court.

Judge's Statement as to "Independent Research."

In rendering his decision on the question of revocation the trial judge made the following statement:

> The docket sheet indicates probation hearing. However, it is not a hearing in aggravation, which the State is requesting. I haven't made a finding with the probation petition. I took it under advisement. This has presented a problem, a great one. I have gone to bed with this two or three nights. *I have done some independent research and have studied this very carefully.* It comes to pass in the life of everybody where they have to do unpleasant tasks. The court was much impressed with the testimony of the psychiatrist, Dr. Ziporyn, but, however, he talked mostly in his testimony about the passive-aggressive personality. His testimony was that passive-aggressive personality is another word for "bad temper." *My independent research, the studying I have done in the past two weeks, indicate to me just that.* Some people don't feel quite right unless they wreck up the furniture, beat wives, kick a dog around. These people are not insane, not feeble-minded, not-immune to prosecution in any sense of the word. Therefore, under these circumstances, and taking into consideration the record of the previous hearing, I cannot with good conscience grant you probation at this time. (Emphasis added)

Reason for Granting Writ

Whether one believes that the Sixth Amendment right of confrontation has been made obligatory upon the states by the Fourteenth Amendment as was stated in the opinion of the Court written by Mr. Justice Black in *Pointer* v. *Texas*, 380 U.S. 400, or whether one believes merely that a right of confrontation is implicit in the concept of ordered liberty, as was stated by Mr. Justice Harlan in his opinion concurring in the result in *Pointer*, 300 U.S. at page 408, the statement by the trial judge that he engaged in "independent research," indicates a flagrant violation on his part of decisions governing the right of a defendant to be confronted with the witnesses against him as required by the Constitution of the United States.

The cases are few concerning the particular question involved in this petition. Interestingly enough, the Supreme Court of Illinois seems to have been the only court that has fully examined the question and the only federal case that has touched upon it, *Gordon* v. *United States* (6 Cir., 1949) 178 F. 2d 896, had to construe the Illinois authorities.

In *People* v. *Cooper*, 398 Ill. 468, 75 N.E.2d 885, the court had before it a murder case in which the trial judge before conviction, made a private investigation of certain of the defendant's character witnesses, and after conviction, he made a private investigation of the premises where the homicide occurred. The conviction was reversed by this court, saying, "Exclusive of certain matters of which the court may take judicial notice, the deliberations of the trial judge are limited to the record made before him in open court. In short, any private investigation by the court pending a motion for a new trial, constitutes a denial to the defendant of the constitutional guarantee of due process of law." 75 N.E.2d at p. 886.

Later, the Supreme Court of Illinois considered the case of *People* v. *Rivers*, 410 Ill. 410, 102 N.E.2d 303. There the trial judge apparently took into consideration certain out of court statements made by the State's Attorney of Cook County, and also indicated that during the several week period between the trial and a motion for new trial certain communications had been made to him. The trial court said, "I don't think you can add to what has been said to me over these weeks."

The Court reversed the conviction in *Rivers*, and said, "The defendant in any criminal proceeding has an inherent and constitutional right that all proceedings against him shall be open and notorious and in his presence and any inquiry or any acquisition of information or evidence outside of open court and outside of the presence of the defendant is prejudicial error. The defendant cannot be expected to know the scope and the extent of any private inquiry made by the court outside of open court and he is not required to inquire into such matters and to resort to extraneous proof to show that he has been prejudiced. He has a right to rely upon his constitutional guarantee that nothing shall be considered against him except the competent evidence introduced in open court in his presence, by the witnesses who confront him." 102 N.E. 2nd at p. 306.

Still another case decided by the Supreme Court of Illinois on the same question is *People* v. *Thunberg*, 412 Ill. 565, 107 N.E. 2nd 843. In that case, the defendant was charged with the crime of rape and crime against nature. The trial judge in *Thunberg* read a confession obtained by the police from a co-defendant and privately interviewed the prosecutrix and her parents outside the presence of the defendant and his counsel. This court reversed, quoting extensively from the opinion in the case of *People* v. *Rivers*, 410 Ill. 410, 102 N.E.2nd 303, quoted above.

A still later case, is *People* v. *Wallenberg*, 24 Ill.2d 350, 181 N.E. 2nd 143. In that case, the trial judge based his finding of guilty in part on his knowledge of a certain area of the city the nature of which figured in the defendant's alibi defense. Again, this court reversed the conviction stating, "while the evidence appearing in the record may be sufficient to establish the guilt of the defendant, the credibility of defendant and the defensive alibi were minimized and, in fact, entirely negated by the trial court's resort to personal beliefs." 181 N.E.2d at p. 145.

The court in *Wallenberg* also cited with approval the cases of *Thunberg, Rivers* and *Cooper*, discussed above.

The record is explicit that the private investigation conducted by the trial judge was the major cause of the judge's decision to revoke probation in the cases in which the defendant had been placed on probation and the decision not to grant probation in the case in which the defendant had entered his plea of guilty.

Conclusion

For the foregoing reason, the Petition for Certiorari should be granted.

Respectfully submitted,

CHARLES A. BELLOWS,
Attorney for Petitioner

JASON E. BELLOWS
On the Brief

APPENDIX A

OPINION OF THE APPELLATE COURT.

MR. JUSTICE GUILD delivered the opinion of the court:

The defendant herein was originally convicted of driving on a suspended or revoked license and failing to reduce speed to avoid an accident. On August 14, 1969, he was released upon probation. One of the conditions of his release obviously being that he was not to drive a motor vehicle during his probation. Apparently the probation order did not alter the defendant's desire to drive an automobile and on April 24, 1970 he was again charged with driving a motor vehicle with a suspended or revoked license. He was not prosecuted on the April 24, 1970 charge but rather it was used as the basis for the petition for revocation of the probation previously granted. A revocation petition was filed in the original proceedings and the defendant likewise filed another petition for release on probation. The petition for revocation and the petition for another probation were consolidated and heard on October 2, 1970. On October 16th, 1970 the defendant's new petition for release on probation was denied, his probation was revoked and following a hearing in aggravation and mitigation the defendant was sentenced to serve 90 days in the State Farm at Vandalia. The defendant was released on bond pending this appeal.

The defendant has presented two issues to this court for review, the first being that the trial court abused its discretion in revoking his probation. Defendant points out that the statutory provision pertaining to probation is found in Ill. Rev. Stat. Ch. 138, Sec. 117-1 (1969). An examination of those provisions is most interesting. The

first is that the defendant is not likely to commit another offense. In this case the defendant has in fact committed exactly the same offense after being released upon probation. The second statutory provision found is that public interest does not require the defendant to receive the penalty. An extended hearing was had in aggravation and mitigation and we find that from 1957 to August 14, 1969, the date the defendant was originally placed on probation, the defendant had been convicted on seven charges of speeding, three other traffic offenses, was involved in one collision, had been convicted twice of driving while intoxicated, and his license had been suspended four times by the Secretary of State. The public interest of this State certainly requires the penalty and a substantial penalty for such flagrant violations of the motor vehicle laws of this State. The third statutory provision pointed out by the defendant in Section 117-1 above provides that a person may be admitted to probation where the rehabilitation of the defendant does not require that he receive the penalty provided. Defendant's counsel states that the rehabilitation of the defendant here does not require that he receive the penalty. After a total of at least twelve serious motor vehicle violations ranging from speeding to driving while intoxicated, and notwithstanding this, the granting of probation to the defendant, does not in any way indicate that the rehabilitation could or should be accomplished without the penalty being imposed.

The second contention of the defendant is that the sentence imposed, 90 days in the State Farm at Vandalia, is excessive. The maximum penalty that may be imposed under Ill. Rev. Stat. Ch. 95½, Sec. 6-303 (1969) is one year in jail. In view of the above record and in view of the violation of probation by the commission of exactly the

same offense, to-wit: the driving of a motor vehicle while license is suspended, the penalty imposed of 90 days is not only not excessive but also most lenient under the facts in this case. Sec. 6-303, supra, provides for a mandatory jail sentence of at least seven days while driving while a license is suspended or revoked. Apparently the legislature of this State felt that this offense was serious enough to warrant a jail sentence in the first instance. In the instant case the defendant here committed the second offense in addition to the many other motor vehicle violations. The record does not disclose that he even received the seven day sentence in jail for the first offense.

Judgment affirmed.

P. J. Moran and J. Abrahamson Concur.

APPENDIX B

DOCKET ENTRY

APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

Case 71-53

December 27, 1971 — Affirmed.

APPENDIX C

STATE OF ILLINOIS
APPELLATE COURT SECOND DISTRICT
ELGIN, ILLINOIS 60120

Feb. 23, 1972

The Court Has This Day Entered The Following Order In The Case Of:

Gen. No. 71-53

People of the State of Illinois, vs. William C. Rusch
Petition for rehearing denied.

Howard K. Kellett
Clerk

APPENDIX D

UNITED STATES OF AMERICA

STATE OF ILLINOIS)
) ss.
SUPREME COURT)

AT A TERM OF THE SUPREME COURT, *begun and held in Springfield, on Monday, the eighth day of May in the year of our Lord, one thousand nine hundred and seventy-two, within and for the State of Illinois.*

Present: Robert C. Underwood, *Chief Justice*
Justice Walter V. Schaefer
Justice Daniel P. Ward
Justice Joseph H. Goldenhersh
Justice Thomas E. Kluczynski
Justice Charles H. Davis
Justice Howard C. Ryan
William J. Scott, *Attorney General*
Robert G. Miley, *Marshal*
Attest: Justin Taft, *Clerk*

BE IT REMEMBERED, *that, to-wit: on the 23rd day of May, 1972, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said court, had and entered of record, to-wit:*

People State of Illinois, *Respondent*
No. 45070 vs.
William C. Rusch, *Petitioner*

Petition for Leave to Appeal from Appellate Court
Second District 71-53

And now on this day the Court having duly considered the Petition for Leave to Appeal herein and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.